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No. 93-___

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN SECURITY BANK, N.A., JUNIUS S. MORGAN, Trustee and FRED J. RICE, III, Trustee,
*Petitioners,*

v.

DEMPSEY SUPPLY CORPORATION,
*Respondent.*

**Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the attachment, without prior notice and hearing, of a mechanic's lien against interests in real property held by both owners of the real property and other holders of interests therein not in privity with the lien claimant, is a taking of property invoking the due process requirements of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the right to a post-deprivation hearing to determine the invalidity of a mechanic's lien without any requirement of a hearing within a reasonable time and placing the burden on the owner of an interest in real property not in privity with the lien claimant to prove the invalidity of the lien, rather than upon the lien claimant to establish the lien, provides a meaningful and effective post-deprivation remedy as required by the Fourteenth Amendment to the Constitution.

3. Whether a statutory scheme which does not provide any early remedy to the holder of an interest in real property subjected to a mechanic's lien without prior notice and hearing, and which provides judicial immunity to the party filing such lien, provides a meaningful remedy for the wrongful, albeit temporary, taking, as required by the Fourteenth Amendment to the Constitution of the United States.

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**On Petition For A Writ Of Certiorari To The Supreme Court of Virginia**

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## PETITION FOR A WRIT OF CERTIORARI

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**SPECIAL NOTIFICATION TO THE ATTORNEY GENERAL OF VIRGINIA PURSUANT TO RULE 29.4(c)**

Please take notice that the constitutionality of the Virginia mechanic's lien statute is drawn in question in this proceeding and 28 U.S.C. Section 2403(b) may be applicable.

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[1] Parent or subsidiary companies to be listed pursuant to Supreme Court Rule 29.1 are set forth at page 38a of the Appendix.

## OPINIONS BELOW

The Order of the Supreme Court of Virginia is not reported, and is reprinted in the Appendix to this Petition at Page 1a. The Decree of the Circuit Court of Fairfax County, Virginia is not reported, and is reprinted in the Appendix at Pages 2a-3a.

## JURISDICTION

The decision of the Supreme Court of Virginia was issued on August 4, 1993. See Appendix at 1a. In this case, the validity of the Virginia mechanic's lien statute was drawn in question on the ground of its being repugnant to the Constitution of the United States. This Court therefore has jurisdiction under 28 U.S.C. Section 1257(a).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 43-3(a) of the 1950 Code of Virginia provides in pertinent part as follows:

> All persons performing labor or furnishing materials of the value of fifty dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold. . . shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof. . . .

Section 43-4 of the 1950 Code of Virginia provides as follows:

> A general contractor, or any other lien claimant under Section 43-7 and 43-9, in order to perfect the lien given by Section 43-3, shall file at any time after the work is commenced or material furnished, but not later than ninety days from the last day of the month in which he last performs labor or furnishes material, but in no event later than ninety days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is . . . a memorandum showing the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien. It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in Section 43-4.1, in the name as well of the claimant of the lien as of the owner of the property, and from the time of such recording and indexing all persons shall be deemed to have notice thereof.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

In this case, the Petitioners moved the Circuit Court of Fairfax County, Virginia (the "Trial Court") to determine the mechanic's liens filed by Respondent against real property in which the Petitioners owned an interest to be invalid on the ground that the Virginia mechanic's lien statute effected a taking of a significant property interest without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. See Appendix at page 5a.

Petitioners contended that the filing of a lien, while not working a dispossession of property, impairs the ability to alienate property at full value and therefore constitutes a taking of a constitutionally cognizable interest in property, in which case an owner of an interest in real property is entitled to procedural due process. The challenge to the statute was fostered by the decision of the United States Supreme Court in *Connecticut v. Doehr*, 501 U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), which held that even the temporary or partial impairments to property rights that attachments and liens entail are sufficient to merit due process protection. Petitioners further contended that the lien statute is unconstitutional because it does not provide for prior notice, hearing or adequate safe-

guards, such as judicial supervision of the perfection process, a probable cause hearing immediately subsequent to the filing of the lien or the posting of a bond by the lienor at the time of filing, against the deprivation of property as required by *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) and *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

The Trial Court held that the Virginia mechanic's lien statute was constitutional in all respects and therefore upheld the validity of the lien statute. *See* Appendix at 4a. The Supreme Court of Virginia entered its Order on August 4, 1993, holding that there was no reversible error in the Trial Court's Decree and dismissing Petitioners petition for appeal. Appendix at 1a. On August 6, 1993, Petitioners moved the Supreme Court of Virginia for an Order deferring issuance of its Mandate in this case pending presentation of a Petition for a Writ of Certiorari to this Court. No action has been taken on Petitioners' Motion.

## SUMMARY OF REASONS FOR GRANTING A WRIT

Since *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), the United States Supreme Court has decided a number of cases challenging the constitutionality of creditor's prejudgment remedies. The Court has not refined and systematized the due process concepts first articulated in *Sniadach*, and the latest post-*Sniadach* decision, *Connecticut v. Doehr*, leaves lower courts in conflict as to what process is due in cases where, as here, the lienor claims a pre-existing interest in the property sought to be attached. This case offers this Court

the opportunity to decide and refine this important issue of constitutional law.

All states have statutes that, like the Virginia statute at issue here, grant mechanic's and materialmen liens on real property which is improved by their labor and materials. When such a lien is filed without prior notice and without opportunity for a hearing, and where the state statute does not provide for a hearing immediately subsequent to the filing of the lien and for the posting of a bond or other compensation to the owner of an interest in real property for damages caused by the erroneous filing of the lien, the state statute effects a deprivation of a significant property interest without due process of law. This Court should grant certiorari to review the important constitutional issues presented by the Virginia Supreme Court's decision in this case.

The decision below raises important constitutional questions under this Court's decisions concerning the Due Process Clause of the Fourteenth Amendment. The Virginia Supreme Court's decision upholding the constitutionality of a statute that effects a judicially privileged taking of a constitutionally cognizable interest in property without prior notice and an opportunity to be heard and without providing for adequate procedural safeguards is inconsistent with the decisions of this Court holding such statutes to be unconstitutional. Review by this Court is warranted because *Mitchell, North Georgia,* and *Doehr* require a probable cause hearing immediately subsequent to the filing of the lien or attachment and require the posting of a bond by the lienor at the time of filing. The mechanic's lien statutes of most states,

including Virginia's, do not provide those protections against the erroneous deprivation of property.

## REASONS FOR GRANTING THE WRIT

## VIRGINIA'S HOLDING THAT THE COMBINATION OF PROCEDURAL SAFEGUARDS CONTAINED IN ITS MECHANIC'S LIEN STATUTE SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS PRESENTS AN IMPORTANT ISSUE UNDER THE FOURTEENTH AMENDMENT THAT SHOULD BE RESOLVED BY THIS COURT.

### A. State mechanic's lien statutes effect a deprivation of a significant property interest

All 50 states, as well as the District of Columbia, have mechanic's lien statutes.[2] These laws give persons who furnish labor or material for the improvement of real property the right to claim an interest in the property. The right to file a lien arises from the performance of work on the property; however, to preserve, perfect and enforce the lien, the mechanic must comply with certain statutory requirements.

Mechanic's lien statutes generally permit the lienor to record a lien with the recorder of deeds or a similar official. *See, e.g.*, Va. Code Section 43-4. In Virginia, the lienor must submit a memorandum identifying the property against which the lien is claimed, the owner of the property, the amount claimed and the time when the same was due and payable. *Id.* The statutes generally provide that the lien is discharged unless

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[2] A survey of state mechanic's lien statutes setting forth their various procedural safeguards is included in the Appendix beginning at page 10a.

the lien is filed within a specified period of time—in Virginia, no more than 90 days after work on the improvement is completed. Va. Code Section 43-4. Once the lien is recorded, it is constructive notice to subsequent owners of an interest in the real property that their interest in the property is subordinate to the lienor's. From the time that the lien is recorded until it is ultimately discharged or enforced, the value of the property is reduced at least[3] by the amount of the lien because prudent persons subsequently acquiring an interest in the real property will protect themselves by deducting the amount of the lien from the value of the property. The lienor, having filed the lien by recording it, may be under no obligation to take further action—in Virginia, he is not. If he wishes to foreclose the lien and have the property sold to satisfy his claim, he must institute judicial proceedings. If no foreclosure action is brought, the lien continues as an encumbrance on the property until it is discharged by payment or until its statutory life expires. The statutory life varies from state to state, and in Virginia, is the later of six months from recording of the lien, or sixty days from when work on the improvement is terminated. Va. Code Section 43-17.

The impact of the lien on the owner of the interest in real property can vary from state to state because some states permit the enforceable aggregate amount of liens filed to exceed the amount due under the

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[3] Some statutes secure attorney's fees, interest and costs. In *American Standard Homes Corporation v. Reinecke*, 245 Va. 113, at 121, 425 S.E.2d 515, 520 (1993), the Supreme Court of Virginia held that mechanic's lien claimants are entitled to prejudgment interest on the amount of their liens.

contract for the improvement, while other states limit the liens to the unpaid contract price. *See* 53 Am. Jur. 2d, *Mechanic's Liens*, Section 8 (1970). Thus, under the first scheme, the extent of the owner's liability can be in excess of the anticipated cost to him. The Virginia statute limits the owner's total liability to the contract price. Va. Code Sections 43-7, -9. However, the statute allows subcontractors and materialmen to file liens even though the general contractor has filed a lien for the same work or materials. Va. Code Sections 43-7, -9. Thus, an owner could conceivably have liens filed against his property amounting to multiples of the amount actually owed.[4]

The procedural protections afforded the owner of an interest in real property also vary among the states. Most states do not require either the posting of a bond by the lienor or provide for judicial supervision of the perfection of the lien. Many states provide no means for the owner of the interest in real property either to dissolve the filed lien or to hasten litigation on the validity of the lien. Other states permit an owner to compel a lienor to bring enforcement proceedings, however, a lien in these states encumbers the property until final determination of the validity of the claim, a process that can involve extensive delay. Virginia provides slightly more protection for the owner of the interest in real property than these latter states. Virginia permits any interested party, upon a showing of good cause, and after reasonable notice to the lien claimant, to petition the court to hold a hearing to determine the validity of a perfected

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[4] It can be seen from review of the Survey of State Mechanic's Lien Statutes printed in the Appendix at page 10a that 47 states and the District of Columbia permit the filing of multiple liens.

mechanic's lien. Va. Code Section 43-17.1. The show cause requirement, however, offers little by way of immediate relief to the owner of the interest in real property: the burden of going forward and, apparently, the burden of proof are on the owner of the interest in the real property. The owner of the interest in the real property—with the permission of the court—may also release his property from the lien by posting a bond for double the amount claimed. Va. Code Section 43-71.

Virginia's statute, as well as those of most other states, permits the lienor to lien property without judicial supervision or the posting of a bond. Once filed, the lien reduces the value of the owner's real property without giving the owner of the interest in the real property the right to an immediate hearing at which invalid or excessive claims can be cancelled or reduced. The amount due to the lienor may prove less than the amount liened when the lien is eventually enforced, but a wholly unjustified lien reduces the property value in the interim just as much as does a wholly justified lien. Unless permitted and able to post a bond, the owner of the interest in the real property cannot ameliorate the property deprivation occasioned by the lien. The owner of the interest in the real property must abide a judicial determination most assuredly far removed in time from the filing of the lien. This delay, coupled with the impairment in the property value resulting from the mere filing of the lien, raises the procedural due process issue for which review is sought by this Court.

**B. The Fourteenth Amendment requires an immediate post-deprivation hearing, judicial supervision and the posting of a bond by the attaching creditor.**

*Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) held that, absent exigent circumstances, due process required prior notice and a hearing prior to the deprivation of any significant property interest. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) seems to have retreated from the rigid prior hearing rule announced by this Court in *Fuentes*. *Mitchell* upheld a Louisiana sequestration statute that did not provide a hearing prior to the seizure of the debtor's personalty. The statute did provide for an immediate post-deprivation hearing and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued. The statute also required judicial supervision of the issuance of the writ of sequestration and obliged the creditor to post a bond prior to issuance of the writ.

*Mitchell* examined the Louisiana procedure's impact on competing owners of different interests in personalty—the buyer's right to possession *versus* the seller's lien—and the extent to which the procedure protected against erroneous deprivations. *Mitchell* assessed whether the procedure achieved "a constitutional accommodation of the respective interests of buyer and seller." 416 U.S. at 610. *Mitchell* distinguished *Fuentes* because the Florida and Pennsylvania replevin statutes reviewed in that case provided no judicial supervision of the procedure or opportunity for a hearing until final adjudication. 416 U.S. at 615-16. In reaching its result, the *Mitchell* Court carefully assessed the competing interests, focusing both on the

importance to the creditor of not applying the *Fuentes* prior hearing rule, 416 U.S. at 609-10, and on the extent to which the procedural safeguards of the Louisiana procedure minimized the possibility of an erroneous seizure. 416 U.S. at 609-10.

*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), invalidated Georgia's garnishment statute because the writ of garnishment issued without judicial supervision and without an early post-deprivation hearing for the debtor. 419 U.S. at 607. Thus, the absence of two of the safeguards deemed important in upholding the Louisiana statute in *Mitchell* was fatal to the Georgia statute.

This Court's most recent decision involving procedural due process and creditor's remedies, *Connecticut v. Doehr*, 501 U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), held Connecticut's prejudgment attachment lien statute unconstitutional. Concluding that the filing of a lien on real property deprived the owner of a "significant property interest," 111 S.Ct. at 2114, the Court examined the procedural safeguards to protect the property owner from an erroneous deprivation of any property rights. Although the Connecticut statute provides for an expeditious post-attachment hearing, notice for such a hearing, judicial review of an adverse decision, and a double damages remedy, the Court held that these safeguards did not adequately ameliorate the risk of erroneous deprivation.

*Mitchell, North Georgia*, and *Doehr*, considered together, seem to repudiate the strict prior hearing rule announced in *Fuentes*. At the same time, the three decisions make it clear that the Court will not drastically curtail the procedural protection for the owner

of an interest in real property. Reconciling the four cases, in the domain of creditors' remedies, due process requires that the owner of an interest in real property be afforded maximum protection from wrongful seizure that is consistent with protection of the creditor's interests. Any statutory provision that reduces the amount of protection provided to the debtor must be justified as necessary to provide a corresponding increase in the amount of protection received by the creditor or to advance some other significant state interest.

A mechanic's lien statute protects the lienor in an obvious way: by filing a claim of lien, the lienor ensures that the owner of an interest in real property will not defeat the creditor's entitlement to payment for labor and materials by alienating the improved property. *Mitchell* deemed it permissible to postpone the hearing to which the debtor was entitled until after his goods had been seized because of the real risk that, if notified in advance, the debtor would alienate the goods, thwarting the creditor's vendor's lien by operation of law. 416 U.S. at 609. Assuming, *arguendo*, that imposition of a prior hearing intrudes on countervailing creditor interests in the context of attachment of real property, and that the property owner does not derive a significant benefit in terms of added protection against erroneous deprivation from a prior hearing rather than an early post-perfection hearing, there remains to be considered the property owner's stake in an early post-perfection hearing. Neither the Trial Court nor the Virginia Supreme Court found that the protections afforded the debtor by the Virginia mechanic's lien statute were as constitutionally sanctioned as those approved

in *Mitchell*. The lower courts seemed to have found that these discrepancies were not fatal to the statute in cases where, as here, the attaching creditor claims an interest in the attached property. *See* Appendix at 4a.

On the contrary, however, the owner of an interest in real property has significant interests that should be protected by an immediate post-deprivation hearing. This is true whether or not the creditor has a concurrent interest in the attached property. The lien filing affects his ability to alienate his property at its full value. In Virginia, this disability can continue for an extended period of time. If the lienor takes no action, the owner's property remains encumbered for the lien's statutory life of the later of six months or sixty days from completion of the project. Va. Code Section 43-17. If the lienor merely files suit to enforce the lien and takes no further action, the lien encumbers the property indefinitely; in this case, the hearing on the merits of the mechanic's lien claims was more than two years after the liens were filed. The owner can, if he wishes to shorten this period, institute show-cause proceedings after serving notice upon the lienor. Va. Code Section 43-17.1. The show-cause procedure offers little immediate relief to the debtor. Section 43-17.1 petitions receive no special priority on the docket and are subject to all the procedural delays endemic to our crowded courts. The owner of an interest in real property having a valid defense to a lien wants an early hearing on the merits; under Virginia's procedure, there is no assurance he will get it. Valid or not, the lien will remain as a property deprivation for a significant period of time.

Despite the failure of the Virginia statute to require an immediate post-perfection hearing, the Trial Court's opinion went no further than finding that the Virginia mechanic's lien statute sufficiently satisfied due process. Petitioner maintains that only an immediate post-deprivation hearing provides adequate protection for the property owner against erroneous claims.

*Mitchell* found judicial supervision of the issuance of the writ significant in providing adequate procedural safeguards to the debtor. 416 U.S. at 605-06. Judicial supervision requires the creditor to make a clear showing before a judge of the nature and amount of the claim and the grounds upon which it is based. *Id.* Judicial supervision is, in the Court's view, an acceptable method of reducing the chances that the issuance of the writ would result in an erroneous property deprivation. 416 U.S. at 616-17. Pre-filing judicial review would also serve to discourage the filing of frivolous liens, especially in states, like Virginia, where lienors are immune from actions for damages for filing invalid liens. *See Donohoe Construction Co., Inc. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988).

The statutory procedure considered in *Mitchell* required the creditor to post a bond before initiating the process of depriving the debtor of his property interest. 416 U.S. at 608. The *Mitchell* Court viewed the bond as ensuring that the debtor could recover damages in the event of an erroneous seizure. 416 U.S. at 606. A bond also tests the strength of the creditor's belief in his own claim. *See Fuentes v. Shevin*, 407 U.S. at 83. Because the Virginia mechanic's lien statute fails to provide a prompt post-

deprivation hearing, the owner of an interest in real property's interest in judicial supervision and the posting of a bond against erroneous claims is even more heightened.

Mechanic's liens exist in every state. Because the liens are imposed *ex parte* by the creditor and significantly affect the rights of the property owner, they raise serious problems of procedural due process under the Supreme Court's due process decisions. Even if the due process clause does not require notice and a hearing prior to every deprivation, it does require a prompt post-deprivation hearing at which the attaching creditor bears the burden of proof. In failing to provide for an immediate post-perfection hearing, the mechanic's lien laws leave owners of interests in real property at the mercy of the lienors without providing any additional protection for the interests of the lienor. Accordingly, this procedural deficiency makes lien laws, such as Virginia's, unconstitutional.

**C. *Doehr* has left the lower courts in conflict as to what procedural safeguards satisfy due process when the attaching creditor has a pre-existing interest in the property.**

The Trial Court's holding conflicts with *Reardon v. U.S.*, 947 F.2d 1508 (1st Cir. 1991), in which it was held that a procedure allowing the *ex parte* filing of a lien for environmental clean-up costs on specific property was in violation of a property owner's due process rights.[5] *Reardon*, in turn, conflicts with the recent holding of a panel of the Second Circuit in

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[5] A partial list of other cases challenging the constitutionality of the lien statute showing the amounts of the liens in question is set forth in the Appendix at page 8a.

*Shaumyan v. O'Neill*, 987 F.2d 122 (2nd Cir. 1993), upholding the statute declared unconstitutional in *Doehr* in a case where the creditor claimed a pre-existing interest in the attached property.[6] The lower courts' confusion following *Connecticut v. Doehr* is the result of the unanswered question as to what procedural safeguards are necessary in cases where a creditor has a pre-existing interest in the property being attached, reserved by the majority in footnote 4. 111 S.Ct. at 2113. Conflict between the holdings of the *Shaumyan* and *Reardon* courts that lien statutes were or were not unconstitutional also may have been engendered by differing interpretations of the concurring opinion of Chief Justice Rehnquist in *Doehr*, in which he stated that a pre-attachment hearing and a bond would largely defeat the purposes of mechanic's lien statutes. 111 S.Ct. at 2122 (Rehnquist, C.J., concurring). In this case, Respondent relied on *Doehr's* footnote 4 and Chief Justice Rehnquist's concurrence in contending below that the *Doehr* holding did not apply in the context of dual interests in property.

It is clear that the Trial Court and the State Supreme Court in this case were in need of controlling guidance from this Court as to whether the question reserved in footnote 4 in *Doehr* related to whether a lien filed by one claiming a pre-existing interest in the attached property was a constitutionally cognizable deprivation of property, or related to

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[6] An *en banc* rehearing was denied in *Shaumyan*. On information and belief, the *Shaumyan* holding was not appealed for the reason that the Connecticut statute concerning prejudgment remedies was amended on June 30, 1993 to address the constitutional infirmities enumerated in *Doehr*.

the adequacy of the procedural safeguards necessary to satisfy due process in such a case. Since the Trial Court did not undertake to balance the competing interests of the debtor and the creditor in the attached property, the only grounds upon which it could have upheld the statute, in light of *Doehr*, was to construe footnote 4 and Chief Justice Rehnquist's concurrence as holding that the reduction in property value effected by the filing of a lien is offset by the value that the lienor's labor and materials have added to the owner's property.[7]

One commentator, however, aptly responded to this argument as follows:

> The reasoning that the increased property value due to the lien claimant's services offsets the owner's deprivation is tenuous. First, that analysis assumes an equality between the increased property value and the decrease in the owner's equity due to the perfected lien. That assumption is in no way axiomatic, particularly in states where lien claims can exceed the market value of the improved property. Second, the theory assumes that eventually statutory procedural prerequisites such as timeliness of filing and

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[7] *See, e.g.*, Rendleman, "Analyzing the Debtor's Due Process Interest," 17 Wm. & Mary L.Rev. 35, 37-38 n. 21 (1975): "Other lien interests in real estate, like mechanics' and artisan's liens, allow the owner to continue to possess, but deter sales and mortgages. The artisan presumably added labor and materials roughly equivalent in value to the amount of the lien. If the lien attaches to the value added by the artisan's work and material, interference with the owner's interest may be *de minimis*."

> *foreclosure actions have or will be met.* Finally, that analysis assumes the underlying validity of the lien: the very issue precipitating the dispute. Comment, "Constitutionality of Mechanic's Lien Statutes," 34 Wash. & Lee L.Rev 1067, 1077 n. 56 (1977).

*Fuentes* held that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause;" 407 U.S. at 86. The partial impairment of property rights occasioned by the filing of a lien is therefore constitutionally cognizable even if the lien attaches to the value added to the property by the claimant. This Court can take this opportunity to clarify the law in this area, and make clear that *Doehr* did *not* hold that an attachment lien is not a taking when the creditor has a pre-existing interest in the property, but that *Doehr* instead *reserved* the question of what impact the creditor's interest in the attached property has on the issue of the adequacy of the procedural safeguards provided by the statute in question to protect against erroneous deprivations.

In addition, the majority of the *Doehr* Court did not feel it necessary to reach the issue of a bonding requirement because the statute was invalidated on narrower grounds. 111 S.Ct. at 2118. The lower courts therefore do not know if such a bond is constitutionally required. In this case, the Court can resolve the following issues, left undecided in *Doehr*: (1) Does a lien filed against property in which the attaching creditor has a pre-existing interest constitute a constitutionally cognizable deprivation of property? and (2) Can any post-attachment remedy which does not provide a remedy to cure the effects of a wrongful, albeit temporary, taking, whether by way of a bond or a

damages remedy, be constitutional? The current importance of these compelling questions is reflected in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), holding that the temporary taking suffered by the owner before amendment of a statute depriving him of all economically viable use of his property was compensable under the Fourteenth Amendment.

In *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976), the Court of Appeals of Maryland discussed the effect of *Sniadach* and its progeny in passing on the constitutionality of the Maryland mechanic's lien statute. The court found the statute to be unconstitutional.[8] The Maryland court reconciles *Sniadach*, *Fuentes*, *Mitchell* and *North Georgia* as follows:

> What we glean from *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing* is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in *Fuentes*, unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then, al-

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[8] *See also Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 362 A.2d 778 (1976), *vac'd and remanded*, 423 U.S. 809, *aff'd* 170 Conn. 165, 365 A.2d 393 (1976) in which the Supreme Court of Connecticut found Connecticut's mechanic's lien law to be unconstitutional.

> though this is less clear, the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized. 353 A.2d at 231.

Concluding, the court voiced its lack of confidence about the state of the law in those cases where the seizure of property was not supported by simple documentary proof or the existence of an interest of the attaching creditor in the property. That is quite understandable in view of the fact that Justice White in *North Georgia* had mentioned only three of the elements so clearly set out in the *Mitchell* decision and did not discuss the element dealing with the facility of documentary proof attending issuance of the writ. 419 U.S. at 607. That omission made it difficult to tell whether *North Georgia* meant to remove the question of documentary proof as an essential element in a decision about the requirement of prior notice and a hearing. The court in *Barry Properties* was naturally perplexed by its inability to articulate with any certainty the message flowing from the sequence of *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia*. 353 A.2d at 231.[9] Justice White did discuss the element dealing with the facility of documentary proof in *Connecticut v. Doehr*, but the Court in *Doehr* did not use its latest opportunity to make a clear delineation of the essential elements for due process in cases, like this one, where not all of the *Mitchell*

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[9] For a discussion of the lower courts' perplexity in reconciling *Fuentes*, *Mitchell*, and *North Georgia*, *see* Griffith, "The Debtor, the Creditor, and the Fourteenth Amendment," 28 Mercer L. Rev. 663 (1977).

ameliorative factors are present. It is clear that the Trial Court, the *Shaumyan* court and the Supreme Court of Virginia are founding their decisions on unsettled law.

This Court again has the opportunity to articulate step-by-step due process analysis in cases, like this one, involving dual interests of the parties in the attached property. Justice Blackmun justifiably regretted the Court's abandonment of intelligible due process analysis in favor of a "sparse comparisons" approach, stating that this case-by-case approach provides no satisfactory answers to issues of constitutional magnitude. *North Georgia, supra,* 419 U.S. at 614-15, 620 (Blackmun, J., dissenting). This Court may take this opportunity to reconcile its due process decisions and develop the systematic due process analysis necessary for a rational jurisprudence.

## CONCLUSION

The Trial Court did not undertake to balance the competing interests of the lien claimants and the owner in the real property in question, as required by *Mitchell.* The lower courts in this case made no attempt to define what substantial creditor interest was protected by permitting filing of a lien with no requirement of an early hearing or a bond or damages remedy to protect the owner against the erroneous deprivation of his interest in property. Mechanic's liens are a violation of the due process analysis established, though not articulated, by the Supreme Court in its decisions culminating in *Doehr.* Putting aside the issue of the pre-existing interest of the creditor in the attached property, the cases suggest that there must be an early post-deprivation hearing, in

which the creditor must carry the burden of proof. There is also a requirement of judicial supervision of the issuance of the writ. The additional requirement that the creditor post a bond or that the statute provide the debtor with a damages remedy reduces the risk of erroneous deprivation by testing the creditor's belief in the validity of his claim and assures the owner of redress in appropriate circumstances.

In granting certiorari in this case, the Court will have the opportunity to articulate due process analysis in cases where the creditor claims a pre-existing interest in the attached property but the statute in question does not contain all of the *Mitchell* ameliorative factors. If the Court analyzes the ameliorative factors in the challenged procedure to determine if it strikes a sufficient protective balance to accommodate the interests of both debtor and creditor, it will find that most state mechanic's lien statutes, including the Virginia mechanic's lien statute, do not sufficiently protect owners from erroneous deprivations of property. The Court should therefore issue a writ of certiorari to review the federal constitutional challenge to the Virginia mechanic's lien statute.

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# APPENDIX

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## ORDER OF THE SUPREME COURT OF VIRGINIA ON THE 4TH DAY OF AUGUST, 1993 HOLDING THAT THERE IS NO REVERSIBLE ERROR IN THE JUDGMENT COMPLAINED OF:

### RECORD NO. 930590

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

## DECREE OF THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

### IN CHANCERY No. 121870

This cause came to be heard this day upon the papers formerly filed herein, the motion of the Complainant, Dempsey Supply Corporation, for entry of this Decree, and argument of Counsel.

And it appearing to the Court that the amounts claimed by the Complainant, Dempsey Supply Corporation, in Count II of the Bill to Enforce Mechanic's Liens have been compromised and that Count II of the Bill has been settled in full by Complainant and the Defendants, American Security Bank, N.A., Junius S. Morgan, Trustee, and Fred J. Rice, III, Trustee.

And it further appearing to the Court that the said Defendants have no defenses to the mechanic's lien sought to be enforced in Count IV of the Bill and that the same should therefore be declared to be valid, to which ruling said Defendants hereby note and renew their exception on the ground that the Virginia mechanic's lien statute violates the due process clause of the Fourteenth Amendment to the United States Constitution.

UPON CONSIDERATION WHEREOF, it is, therefore, ADJUDGED, ORDERED and DECREED that the motion of the Complainant, Dempsey Supply Corporation, for entry of this Decree, be, and the same hereby is, GRANTED; and

It is further ADJUDGED, ORDERED and DECREED that Count II of the Bill to Enforce Mechanic's Lien filed herein by the Complainant be, and the same hereby is, DISMISSED WITH PREJUDICE as to the Defendants, American Security Bank, N.A., Junius S. Morgan, Trustee, and Fred J. Rice, III, Trustee; and

And it is further ADJUDGED, ORDERED, and DECREED that the Memorandum of Mechanic's Lien claimed by the

Complainant and recorded in Deed Book 7728 at Page 1293 of the land records of Fairfax County, Virginia and which purports to claim a mechanic's lien on the real property described therein be, and the same hereby is discharged of record as paid and satisfied; and

It is further ADJUDGED, ORDERED and DECREED that, as evidence of the satisfaction and discharge of the above-described lien, the Clerk of this Court be, and he hereby is, directed to spread a copy of this Decree amongst the land records of this County, and to index the same under *Dempsey Supply Corporation* and *Westchester Homes of Virginia, Inc.*; and

It is further ADJUDGED, ORDERED and DECREED that the mechanic's lien of which enforcement is sought in Count IV of the Bill to Enforce Mechanic's Lien be, and hereby is, determined to be valid and enforceable in its entirety.

AND THIS DECREE IS FINAL.

ENTERED this 13th day of April, 1993.

/s/ Richard J. Jamborsky
Judge

## TRANSCRIPT OF ORAL RULING OF CIRCUIT COURT OR FAIRFAX COUNTY ON OCTOBER 23, 1992

### IN CHANCERY NO. 121870

THE COURT: Well, I have read all of your cases and have spent some time on it, and I hate to give you a very quick summary decision, but I will. I feel that the Virginia Statute is constitutional in all respects, that it does provide consitutional due process and that the subcontractor mechanic's lien holder priority is based upon his enhancement of the land through his work and does create an interest.

## PETITION TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA TO DETERMINE INVALIDITY OF MECHANIC'S LIENS

### IN CHANCERY No. 121870

COME NOW the Defendants, American Security Bank, N.A., Junius S. Morgan, Trustee, and Fred J. Rice, III, Trustee, all by Counsel, and file this their Petition to Determine the Invalidity of Mechanic's Liens, pursuant to Section 43-17.1 of the 1950 Code of Virginia, as amended, and in support thereof, state as follows:

1. That by Deed of Trust dated May 16, 1989 and recorded May 22, 1989 in Deed Book 7337 at Page 871 among the land records of Fairfax County, Virginia, Lots 1 through 6, inclusive, Section 1-A, BURKE LAKE MEADOW, were conveyed to Junius S. Morgan and Fred J. Rice, III, Trustees, in trust to secure American Security Bank, N.A. payment of the sum of $5,362,500.00.

2. That by Deed of Trust dated June 6, 1990 and recorded June 15, 1990 in Deed Book 7610 at Page 804 of the aforesaid land records, Lots 1, 2, 4, 6, 13 through 16, inclusive, and 19 through 24, inclusive, Section 1-A, BURKE LAKE MEADOW, were conveyed to Junius S. Morgan and Fred J. Rice, III, Trustee, in trust to secure American Security Bank, N.A. payment of the sum of $693,000.00.

3. That Dempsey Supply Corporation seeks to enforce four Memoranda of Mechanic's Lien, pursuant to the provisions set forth in Title 43, Chapters 1 and 9 of the 1950 Code of Virginia, as amended, against the subject property which liens were recorded in Deed Book 7728 at Pages 1263, 1273, 1293 and 1298 on December 28, 1990, among the land records of Fairfax County, Virginia.

4. That the Fourteenth Amendment to the Constitution of the United States of America prohibits any State from depriving any person of property without due process of law.

5. That the filing and perfection of a mechanic's or materialman's lien pursuant to Chapters 1 and 9 of the 1950 Code of Virginia, as amended, is effected pursuant to the statutory authority of the Commonwealth of Virginia. Certain state officials play an essential role in the filing and perfection of the lien. Thus, there is sufficient state action involved in the creation of mechanic's and materialman's liens in Virginia to bring this authority within the purview of the constitutional limitations on the states imposed by the Fourteenth Amendment. Notwithstanding the scope of the Fourteenth Amendment, Article I, Section 11 of the Constitution of the Commonwealth of Virginia provides that "no person shall be deprived of his . . . property without due process of law." Thus, the statutory scheme for mechanic's and materialman's liens in Virginia is constitutionally required to meet minimum standards of due process.

6. That a mechanic's or materialman's lien operates immediately to deprive the owner of the real estate in question of the unrestricted use of his property. This right is a constitutionally protected interest in property and cannot be taken from an individual without due process of law.

7. That due process requires at a minimum that there be notice and an opportunity to be heard prior to any deprivation of a property right. The Virginia mechanic's and materialman's lien law makes limited provision for notice to the owner of the real property and makes no provision for an opportunity to be heard prior to the creation of the lien. Without provisions of this nature, the statutory scheme is constitutionally defective unless extraordinary circumstances justify a variance from traditional due process standards.

8. That Chapters 1 and 9 of Title 43 of the 1950 Code of Virginia, as amended, fail to satisfy the criteria necessary to constitute an extraordinary situation in that there is no governmental or general public interest in providing

for mechanic's and materialman's lien; there is no special need for prompt action; and the procedure is not strictly controlled by the State. Contrary to the requirements imposed by the Supreme Court, the statutes do not provide for judicial control through the process; nor do they require a convincing showing of the necessity of the lien prior to perfecting the same; nor do they provide for an immediate post-seizure hearing in which the complainant is required to prove the validity of his lien.

9. That, in addition, in the instant case, the party asserting a lien herein is not a party to a voluntary agreement with the owner or the beneficiary under the hereinabove described deeds of trust, and the mechanic's lien statute, to the extent it deprives an owner or such a beneficiary of a significant property interest in a case where there is no liability on the part of such owner or beneficiary without due process, is unconstitutional as applied in this case.

10. That, therefore, the Virginia statutory scheme providing for mechanic's and materialman's liens is constitutionally defective and must be overturned and the lien sought to be enforced herein and perfected pursuant thereto must be declared invalid, unenforceable and void.

WHEREFORE, the undersigned Defendants respectfully move this Court, pursuant to Section 43-17.1 of the 1950 Code of Virginia, as amended, to hold a hearing and to enter a decree (1) declaring Title 43, Chapters 1 and 9 of the 1950 Code of Virginia, as amended, to be unconstitutional; and (2) declaring the Memoranda of Mechanic's Lien sought to be enforced herein to be invalid and unenforceable.

**PARTIAL LISTING OF OTHER PENDING CASES INVOLVING CHALLENGES TO CONSTITUTIONALITY OF MECHANIC'S LIEN STATUTE**

Commonwealth Land Title Insurance Company v. Corman Construction, Inc., *et al.*, Docket No. 92-1871, Supreme Court of the United States—Liens totalling $599,000

Mercure Dulles, Inc. v. D&L Electric, Inc., *et al.*, Record No. 930771, Supreme Court of Virginia—Liens totalling $42,340

Metrex Excavating, Inc. v. Mercure Dulles, Inc., *et al.*, In Chancery Nos. 13262, 13268, 13269 and 13270, Circuit Court of Loudoun County, Virginia—Liens totalling $960,489

International Fabricated Steel, Inc. v. Hermes Limited Partnership, *et al.*, In Chancery Nos. 13387, 13388 and 13389, Circuit Court of Loudoun County, Virginia—Liens totalling $139,402.63

LBM Associates, Inc. v. Mercure Dulles, Inc., *et al.*, In Chancery No. 13508, Circuit Court of Loudoun County, Virginia—Liens totalling $62,867

Ben Gravett Enterprises v. Parcon Construction, Inc., *et al.*, In Chancery No. 13289, Circuit Court of Loudoun County, Virginia—Lien in the amount of $24,413

Morgan Gick and Associates, P.C. v. Mercure Dulles, Inc., *et al.*, In Chancery No. 13306, Circuit Court of Loudoun County, Virginia—Lien in the amount of $6,839

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## SURVEY OF STATE MECHANIC'S LIEN STATUTES

| State | Bond Required/Penalty —— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Alabama<br>Ala. Code §35-11-5, *et seq.* | Yes<br>——<br>Research has failed to reveal whether filing of lien is judicially priviledged. | No/Not Applicable |
| Alaska<br>Alaska Stat. §34.35.050 (1990), *et seq.* | No/Yes. §34.35.074. Civil—§34.35.074. (1) Damages caused by violation, plus costs, and reasonable attorney's fees; (2) Injunction, costs, reasonable attorney's fees.<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Arizona<br>Arizona Rev. Stat. Ann. §33-981 (1990), *et seq.* | No/No<br>——<br>Judicially Privileged. *See* §33-420 | No/Not Applicable |

**SURVEY OF STATE MECHANIC'S LIEN STATUTES (Cont'd)**

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §35-11-210 | Within six months of last labor performed. §35-11-221 |
| Yes; § 34-35.112 (1990) | §34.38.080; six months after claim is recorded. |
| Yes; §33-981(B) | Must bring action to foreclose mechanic's liens within six months of recording. §33-998 |

| State | Bond Required/Penalty —— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Arkansas Ark. Code Ann. §18-43-101 (Michie 1987), *et seq.* | No/No<br>——————<br>Judicially Privileged §18-41-1935 | No/Not Applicable |
| California Cal. Civ. Code §3109 (1993) *et seq.* | No/No<br>——————<br>Judicially Privileged. §47, Subd. 2 | No/Not Applicable |
| Colorado Colo. Rev. Stat. §38-22-101 (1990), *et seq.* | No/Yes, if lien knowingly excessive. §38-22-128 (all costs and atty fees);<br>——————<br>No—Basis for libel and slander action lies | No. §38-22-113. Only advances filed suit to head of docket; not a separate hearing on validity of lien/Not Applicable |
| Connecticut Conn. Gen. Stat. Ann. §49-35a (West Supp. 1993), *et seq.* | No/No<br>——————<br>Judicially privileged 493 A.2d 236 | Yes. §49-35b; burden to show probable cause that lien valid on claimant, *if* owner applies to court under §49-35a. |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §18-44-101 | Must file suit within 15 months after filing the lien. §18-44-119. |
| Yes; §§3115 and 3116 | Lien claimant must file suit to foreclose its mechanic's lien within 90 days of the date that its claim of lien is recorded. §3144. |
| Yes; §38-22-101(1) | §38-22-110. Six months after work perfected or building completed. |
| Yes; 436 A.2d 271 (1980) | §49-39; 1 year. |

| State | Bond Required/Penalty ——— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Delaware<br>Del. Code Ann. tit 25, §2701 (1989), *et seq.* | No/No<br>———<br>Research has failed to reveal statutes or case law on this issue | No/Not Applicable |
| Florida<br>Fla. Stat. Ann. ch. 713.01 (Supp 1992), *et seq.* | No/Yes. §713.31; civil damages if fraudulent lien.<br>§713.35; perjury conviction<br>———<br>Research has failed to reveal statutes or case law on this issue. | No. Owner may file complaint, requiring claimant to file suit or show cause within 20 days why lien should not be forfeited; or debtor can file notice of contest, which requires creditor to commence action within 60 days or lose lien. / Not Applicable. §713.21, §713.22 |
| Georgia<br>Ga. Code Ann. §44-14-360 (Michie Supp. 1992), *et seq.* | No/No<br>———<br>Judicially privileged §51-5.8. 397 S.E.2d 620 | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §2702 | None |
| Yes; ch. 713.01(16) | ch. 713.22; 1 year from recording of lien; 60 days after owner files notice of contest of lien. |
| Yes; §44-14-361(a) | Lienor must file suit within 12 months from when debt became due. §44-14-361.1(a)(3). |

| State | Bond Required/Penalty ——— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Hawaii Haw. Rev. Stat. §507-41 (1985), *et seq.* | No/No ——— Research has filed to reveal statues or case law on this issue. | Yes. Not less than 3 nor more than 10 days after application and notice. §507-43(a)/ Burden on lienor to show that probable cause exists for lien. |
| Idaho Idaho Code §45-501 (Supp. 1993), *et seq.* | No/No ——— Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Illinois Ill. Rev. Stat. ch. 770, §60/1, *et seq.* | No/No ——— Judicially Privileged 466 N.E.2d 243 485 N.E.2d 321 339 N.E.2d 274 | No. Not applicable |
| Indiana Ind. Code Ann. §32-8-3-1, (Burns 1980 & Supp. 1992), *et seq.* | No/No ——— Research has failed to reveal statutes or case law on this issue. | No. §32-8-3-10; owner gives 30-day notice to claimant to file suit or lose lien. §32-8-3-11 provides for expedited suit at behest of owner. (30 days)/Not Applicable. |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §507-42 | Following initial hearing, if court finds probable cause for lien to attach, then suit must be commenced within three months. §507-43(3), -47. |
| Yes; §45-501 | Lien claimant must initiate foreclosure of lien within six months of filing. §45-510 |
| Yes; Ill.; §§60/9 and 60/28 | Lienor must file complaint to foreclose a mechanic's lien within two years of the completion of the work. §60/9. |
| Yes; §32-8-3-1 | §32-8-3-6; 1 year from filing lien. |

| State | Bond Required/Penalty<br>——<br>Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Iowa<br>Iowa Code §572.1 (1992), *et seq.* | No/No<br>——<br>Judicially Privileged<br>315 N.W.2d 734 | No, but 572.28 provides for expedited suit upon written demand of owner. (30 days)/Not Applicable |
| Kansas<br>Kan. Stat. Ann. §60-1101 (1983), *et seq.* | No/No<br>——<br>Research has failed to reveal statutes or case law on this issue. | No, but §60-1108 provides for immediate suit by owner for adjudication of liens/ Not Applicable |
| Kentucky<br>Ky. Rev. Stat. Ann. §376.010 (Michie Supp. 1992), *et seq.* | No/Yes. §376.220; civil damages action for damage caused thereby, including reasonable court costs and attorney's fees.<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §572.2 | Lien claimant must file suit within two years from the expiration of the 90-day filing period. §572.27. |
| Yes; §60-1101 | Lien claimant must file action to foreclose within one year of filing of the lien. §60-1105(a). |
| Yes; §376.010 | §376.090; action must be brought within 12 months from date of filing the statement with the clerk. |

| State | Bond Required/Penalty ——— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Louisiana<br>La. Rev. Stat. Ann. §9:4801 (West 1991), *et seq.* | No/Yes. Civil damages action for damages and attorney's fees. §9:4833<br>———<br>Research has failed to reveal statutes or case law on this issue. | No. But owner may "convoke a concursus" after time for filing liens has passed and by rule order claimants to show cause why claim should not be dismissed. §9:4841/Not Applicable. |
| Maine<br>Me. Rev. Stat. Ann. tit 10, §3521 (West 1980 & Supp. 1992), *et seq.* | No/No. 10 §3254 provides no penalty unless shown to be willful or malicious.<br>———<br>Qualified Privilege 857 F.2d 4; 673 F.Supp. 622 | No/Not Applicable |
| Maryland<br>Md. Real Property Code Ann. 9-101 (1988), *et seq.* | Yes—within court's discretion. §9-106(b)(3)(v). No civil penalty—other than bond lost.<br>———<br>Qualified Privilege 373 A.2d 1273 | No lien attaches until claimant prevails at hearing; burden on claimant. §9-106(a). |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §9:4801 | Any party may "convoke a concursus" after period has passed for filing claim. §9:4841. |
| Yes; §3251 | §3255; 120 days after last of labor or services are performed—must file action with clerk of the court. |
| Yes; §§9-101 and 9-102 | Must file petition to enforce within one year after petition to establish lien was first filed. §9-109 |

| State | Bond Required/Penalty<br>——<br>Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Massachusetts<br>Mass. Gen. L. ch. 254, §1 (1988), *et seq.* | None. §11 merely provides that lien will be declared invalid if it is shown lienor has willfully and knowingly claimed more than is due.<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Michigan<br>Mich. Stat. Ann. §26.316 (1982) *et seq.* | Lien is simply dismissed. No civil or criminal penalty. MSA §26.316(111)<br>——<br>Qualified Privilege<br>276 N.W.2d 522<br>463 N.W.2d 479 | No/Not Applicable |
| Minnesota<br>Minn. Stat. Ann. §514.01 (West 1990), *et seq.* | No/No<br>——<br>Qualified Privilege §514.74 | No/Not Applicable |
| Mississippi<br>Miss. Code Ann. §85-7-131 (1991), *et seq.* | No/Yes. Claimant is liable for full amount claimed; §85-7-201.<br>——<br>No. §85-7-201 | No/Not Applicable |

| Time to File Lien | Time to File Suit |
|---|---|
| Yes; §4 | Lienor must commence action to enforce within 60 days of filing. §11 |
| Yes; §26.316(107)(1) | Claim to enforce lien must be brought within one year after claim of lien is recorded. §26.316(111) |
| Yes; §514.01 | Must commence foreclosure within one year after its date of last work. §514.12, subd. 3, 176 N.W. 497 (1900). |
| No; §85-7-135 | Must file suit within 12 months when debt became due and payable. §85-7-141 (1991). |

| State | Bond Required/Penalty<br>——<br>Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Missouri<br>Mo. Ann. Stat. §429.010 (Vernon Supp. 1993), *et seq.* | No/None. §429.080; lien is simply dismissed<br>——<br>Research has failed to reveal statutes or case law on this issue | No/Not Applicable |
| Montana<br>Mont. Code Ann. §71-3-101 (1991), *et seq.* | No/No<br>——<br>Judicially privileged<br>745 P.2d 359<br>70-19-102; 102(1) | No/Not Applicable |
| Nebraska<br>Neb. Rev. Stat. §52-125 (1991), *et seq.* | Civil—damages, including costs of correcting the record and reasonable attorney's fees, if lienor files claim in *bad faith.* §52-157<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Nevada<br>Nev. Rev. Stat. §108.221 (1991), *et seq.* | No/No—claim is dismissed. §108.229<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §429.010 | Lienor must commence action within six months of having filed the lien. §429.170 |
| Yes; §71-3-526(2) (1991). | Action must be initiated within two years of the filing of the lien. §71-3-562 |
| Yes; §§52-127(8), -136 | §52-140; lienor must bring action within two years after recording of lien; |
| Yes; §108.222(1) | Suit must be filed within six months of recording the lien. §108.233. |

| State | Bond Required/Penalty ——— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| New Hampshire N.H. Rev. Stat. Ann. §447:1 (1991), *et seq.* | No/No<br>———<br>Qualified Privilege 379 A.2d 798 | No/Not Applicable |
| New Jersey N.J. Stat. Ann. §2A:44-64 (1987), *et seq.* | No/No—but slander of title action may be brought.<br>———<br>Qualified Privilege 575 A.2d 1375 §2A:44-71 | No/Not Applicable |
| New Mexico N.M. Stat. Ann. §48-2-1 (1987), *et seq.* | No/No<br>———<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| New York Lien Law, Art. 2, §3, (Supp. 1993), *et seq.* | Civil—Lienor is liable for damages, including reasonable attorney's fees. §39a.<br>———<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| North Carolina N.C. Gen. Stat. §44A-7 (1989 and Supp. 1992), *et seq.* | No/No<br>———<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| No; §447:5 | N/A. *See* §447:9 |
| Yes; §2A:44-66 | Must file suit on lien claim within four months after last labor or materials stated in lien claim. §2A:44-98, -99 |
| Yes; §42-2-2; 5 P. 529 (1885) | Lien claimant has two years from date of filing lien claim to commence suit. §48-2-10. (Michie Supp. 1992). |
| Yes; §3 | New York Lien Law §17; lien will continue for one year after notice of lien has been filed. |
| Yes; §44A-18(1-3) (1992) | Action to enforce lien must be instituted within 180 days after the last furnishing of labor or materials. §44A-13(a). |

| State | Bond Required/Penalty —— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| North Dakota N.D. Cert. Code §35-27-01 (1987), *et seq.* | Criminal—A Class A misdemeanor; §35-27-26<br>——<br>No. §See 35-27-26 | No. But suit must be commenced within 30 days after request of owner.<br>§35-27-25 |
| Ohio Ohio Rev. Code Ann. §1311.02 (Anderson 1987 & Supp. 1992), *et seq.* | No/No. §1311.16; attorney's fees to lienholders<br>——<br>Research has failed to reveal statutes or case law on this issue. | No. §1311.311; owner can file notice to commence suit on lienholder, who then has 60 days to enforce or forfeit/lien<br>Not Applicable |
| Oklahoma Okla. Stat. Ann. tit. 42 §141 (West 1990), *et seq.* | §142.4; is a felony to file a fraudulent statement; no civil penalty.<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Oregon Or. Rev. Stat. §87.001 (1991), *et seq.* | No/No<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| No; §35-27-02 | Lienor must file suit within 3 years of recording claim for lien. §35-27-25 |
| Yes; §1311.02 | None provided in statute |
| Yes; §143 | Claimant must commence action to enforce the lien within one year from the filing of lien statement. §172 |
| Yes; §87.010 | Suit to foreclose lien must be filed within 120 days after recording claim of lien. §87.055. |

| State | Bond Required/Penalty —— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Pennsylvania 49 Pa. Cons. Stat. Ann. §1101 (1965), *et seq.* | No/No<br>——————<br>Judicially Privileged<br>502 A.2d 686<br>415 A.2d 698 | Yes. §1505. Burden on owner to show claimant failed to comply with Mechanic's Lien Act. |
| Rhode Island R.I. Gen. Laws §34-28-1 (Supp. 1992), *et seq.* | No/No<br>——————<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| South Carolina S.C. Code Ann. §29-5-10 (Supp. 1993), *et seq.* | No/No. Other than dismissal; §29-5-100<br>——————<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| South Dakota S.D. Code Laws §44-9-1 (1983), *et seq.* | No/No. Other than dismissal; §44-9-16<br>——————<br>Qualified Privilege<br>169 NW 512 | No. Make written demand on claimant to file suit to enforce; if he doesn't within 30 days, he forfeits the lien; §44-9-26/Not Applicable |
| Tennessee Tenn. Code Ann. §66-11-101 (Supp. 1992), *et seq.* | No/No. Other than dismissal; §66-11-139.<br>——————<br>Research has failed to reveal statutes or case law on this issue. | No. On written demand, claimant must file suit within 60 days, or forfeit; §66-11-130/ Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §1301 | None provided in statute |
| Yes; §§34-28-1 | Suit must be instituted within 120 days after filing notice of intention. §34-28-10. |
| No; §§29-5-20, -40 | Must bring suit to foreclose lien within six months after claimant ceases to furnish labor. §29-5-120. |
| Yes; §44-9-1 | File suit within six years; South Dakota Code §44-9-25. |
| Yes; §66-11-115; except if residential property; -146 | §66-11-115; 90 days of lien. |

| State | Bond Required/Penalty —— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Texas<br>Tex. Prop. Code Ann. §53.001 (West 1992), *et seq.* | No/No<br>——<br>Judicially Privileged<br>202 F.Supp. 27<br>543 S.W.2d 715<br>621 S.W.2d 205<br>632 S.W.2d 145 | No/Not Applicable |
| Utah<br>Utah Code Ann. §38-1-10 (1988), *et seq.* | No/Yes. Misdemeanor; civil penalty; §38-1-25.<br>——<br>Judicially Privileged<br>751 P.2d 1131 | No/Not Applicable |
| Vermont<br>Vt. Stat. Ann. tit. 9, §1921 (1984), *et seq.* | No/No<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Virginia<br>Va. Code §43-1, *et seq.* | No/No<br>——<br>Yes. 235 Va. 531, 369 S.E.2d 857 (1988) | No, but any party with interest in property *may* petition court of equity to hold hearing to determine validity of lien. Va. Code §43-17.1/Not applicable. |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §53.056 | The later of two years after date of affidavit of lien is filed or one year after completion of work under the original agreement. §53.158. |
| Yes; §38-1-3 | §38-1-11; lienor must bring an action to enforce within 12 months of completion of work. |
| Yes; §1921(a) (Supp. 1992) | Suit must be commended within three months of filing of notice. §1924 (1984). |
| Within 90 days after work is completed. Va. Code §43-7 and 43-9. | Within 60 days of completion or six months of recording of lien. Va. Code §§43-7 and 43-9 |

| State | Bond Required/Penalty —— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Washington<br>Wash. Rev. Code §60.04.011 (Supp. 1993), *et seq.* | No/Yes. §60.04.221; if claim is frivolous and without legal cause, then owner gets costs and reasonable attorney's fees.<br>——<br>Judicially Privileged<br>826 P.2d 1089<br>RCWA §4.28.320<br>RCWA §60.04.060--658 P2d 679 | No/Not Applicable |
| Washington, D.C.<br>D.C. Code Ann. §38-103 (1981), *et seq.* | No/No<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| West Virginia<br>W.Va. Code §38-2-1 (1985), *et seq.* | No/No. Other than claim dismissed. §38-2-14.<br>——<br>Research has failed to reveal statutes or case law on this issue. | No/Not Applicable |
| Wisconsin<br>Wis. Stat. Ann. §779.01 (West 1981), *et seq.* | No/No<br>——<br>§706.13 | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §60.04.021 | Lienor must file action to foreclose the lien within eight months of recording claim. §60.04.141. |
| Yes; §38-103 | Suit must be commenced within one year of filing of notice. §38-115. |
| Yes; §38-2-2, -21 | Suit must be instituted within six months of the recording of notice of lien. §38-2-34. |
| Yes; §779.01(3) (1981) | Foreclosure must be instituted within two years that claim for lien was filed. §779.06(1). |

| State | Bond Required/Penalty ——— Judicially Privileged | Post-Filing Hearing Required/Burden of Proof at Hearing |
|---|---|---|
| Wyoming<br>Wyo. Stat.<br>§29-2-101<br>(Supp. 1992) | No/No. Other than claim dismissed. §29-2-110.<br>_____<br>Qualified Privilege<br>713 P2d 776 | No/Not Applicable |

| Multiple Liens Allowed? | Time to File Suit |
|---|---|
| Yes; §29-2-101 and -111; 413 P.2d 874 | Suit to enforce lien must be brought within 180 days after filing of lien statement. §§29-2-109, 29-3-109. |

## LIST OF AFFILIATES

1. MNC Financial, Inc. (Md.)
2. MNC Affiliates Group, Inc. (Md.)
3. MNC Credit Corp. (MD.)
4. American Financial Service Group, Inc. (Mich.) (LEASEFIRST)
5. Maryland National Leasing Services Corporation (Md.)
6. MNC Canadian Real Property, Inc. (Md.)
7. MNC Capital Corporation (Md.)
8. Maryland National Realty Investors, Inc. (Md.)
9. A/M Properties, Inc. (Va.)
10. Maryland A/M Properties I Limited Liability Company (Md.)
11. MNC American Corporation (Md.)
12. Prime Rate Premium Finance Corporation (S. Car.)
13. Agency Technologies, Inc. (S. Car.)
14. IFCO,, Inc. (Va.)
15. Mid-Atlantic Life Insurance Company (Ariz.)
16. MN World Trade Corporation (Md.)
17. Maryland National Mortgage Corporation (Md.)
18. Atlantic Coast Mortgage Company (Va.)
19. C.M. Brown & Co., Inc. (N.J.)
20. Maryland National Bank (U.S.)
21. MNB Tarrymore, Inc. (N.C.)
22. MNB University, Inc. (N.C.)
23. FCOP, Inc. (Md.)
24. SCRC Carrolltowne, Inc. (Md.)
25. MNC Academic Management Services, Inc. (Md.)
26. Festival VM Corp. (Md.)
27. MNC Consumer Discount Company (Pa.)
28. MNC National Direct Mail Services Corp. (Md.)
29. Consumer Holdings Corporation (Wyo.)

30. 303 International M Corp. (Md.)
31. Three Ponds M Corp. (Md.)
32. Westfields M Corp. (Va.)
33. Sweitzer M Corp. (Md.)
34. Maryland National Community Development Corporation (Md.)
35. Sorrento M Corp. (Md.)
36. Englewood M Corp. (Va.)
37. Coleman M. Corp. (Md.)
38. Main Street M Corp. (Md.)
39. Melwood M Corp. (Md.)
40. Rannoch M Corp. (Md.)
41. Glen M Corp. (Md.)
42. Windemere M Corp. (Md.)
43. Campus Hills M Corp. (Md.)
44. Sykesville M Corp. (Md.)
45. Spotted Horse Holdings, Inc. (Wy.)
46. Manab Properties, Inc. (Md.)
47. Garrett Cove M Corp. (Md.)
48. Baltin Yachting M Corp. (Md.)
49. Dulaney Valley Corporation (Md.)
50. Rabbit Road M Corp. (Md.)
51. Marco Properties, Inc. (Md.)
52. Southern Homes of Virginia, Incorporated (Va.)
53. Woodside corporation (Md.)
54. Breckinridge Development, Inc. (Ga.)
55. Greenburgh Marco, Inc. (N.Y.)
56. Reprise, Inc. (Md.)
57. Rehold, Inc. (Fl.)
58. Recap, Inc. (Del.)
59. Chesapeake M Corp. (Md.)
60. Courtcom M Corp. (Pa.)
61. MNC International Bank (U.S.—Edge Act)
62. SOP M Corp. (Md.)
63. Wil-Rand M Corp. (Va.)
64. Ballston Corporation (Va.)

65. Baltic M Corp. (Md.)
66. Metropo M Corp. (Va.)
67. Chalmers M Corp. (Va.)
68. Fifty West Corp. (Va.)
69. Shockey M Corp. (Va.)
70. Maryland Nationalease Corporation (Md.)
71. Cambridge VM Corp. (Va.)
72. Carrolltowne M Corp. (Md.)
73. Maryland National Financial Corporation (Md.)
74. 1268 M Corp. (Md.)
75. Woods M Corp. (Va.)
76. Maryland National Financial Services Corporation (Md.)
77. Vernon M Corp. (Md.)
78. Hallmark-Renaissance M Corp. (Va.)
79. MNB Brokerage Alternative, Inc. (Md.)
80. Beaumeade M Corp. (Va.)
81. Bright Seat M Corp. (Md.)
82. MNC Investment Bank, Ltd. (Md.)
83. Ritchie Court M Corporation (Md.)
84. Nor Dan M Corp. (Va.)
85. Service-Wright Corporation (Md.)
86. Manascro M Corp. (Va.)
87. CC Plaza M Corp. (Pa.)
88. Flower Hill M Corp. (Md.)
89. Occoquan M Corp. (Va.)
90. HICO Park M Corp. (Md.)
91. Carlin M Springs Corp. (Va.)
92. Harper Farm M Corp. (Md.)
93. SCRC Process Service Corp. (Md.)
94. Atlantic Sun M Corp. (Md.)
95. Equitable Financial Corporation (Md.)
96. Mirror Ridge A Corp. (Va.)
97. Pratt Management Company (Md.)
98. South Charles Realty Corp. (Md.)
99. Equitable of Washington, Inc. (Md.)
100. Fountain Square Corporation (Md.)

101. Maryland National Pennsylvania Corporation (Pa.)
102. MN Credit Corporation (Md.)
103. American Security Corporation (D.C.)
104. American Security Bank, N.A. (U.S.)
105. Security Trust Company, N.A. (U.S.)
106. ASB Ames Plaza, Inc. (N.C.)
107. ASB-Stevensville Corp. (Md.)
108. ASB Southside, Inc. (N.C.)
109. Forrest-Marbury Corp. (D.C.)
110. American Security (Louisiana) (D.C.)
111. ASB 1660 International I, Inc. (Va.)
112. Elwin Company, Inc. (Del.)
113. 115 International A Corp. (Va.)
114. Wellington Land Co., Inc. (Del.)
115. Washington View, Inc. (Del.)
116. Washington View (NH) Corporation (Del.)
117. Washington View (H) Corporation (Del.)
118. ASB Southwest Corporation (Del.)
119. Field A Corp. (Va.)
120. Sunset Hill Corporation (Va.)
121. Parkway A Corp. (Md.)
122. AS Land II, Inc. (Va.)
123. Caradoc Estates, Inc. (Del.)
124. ASB Realty, Inc. (Del.)
125. Westmarket A. Corp. (Va.)
126. South Point Shopping Center, Inc. (Del.)
127. Brooke Center A Corp. (Va.)
128. Rooms-Springfield, Inc. (Del.)
129. Madison Park A Corp. (Md.)
130. West Madison A Corp. (Md.)
131. Westcom A Corp. (Va.)
132. Mar A Lowe Corp. (Md.)
133. Crest A Leigh Corp. (Md.)
134. Wickliffe A Corp. (Va.)
135. Stevens Pier A Corp. (Md.)
136. Logan Circle A Corp. (D.C.)
137. Quality A Corp. (D.C.)

138. Storage A Corp. (D.C.)
139. Palisades A Corp. (Va.)
140. SOB-A Corp. (Va.)
141. Virgrun A Corp. (Va.)
142. Daventry A Corp. (Va.)
143. Oak Mews A Corp. (Va.)
144. Fallstone A Corp. (Md.)
145. Amberwood A Corp. (Va.)
146. Sully A Corp. (Va.)
147. Devon A Corp. (Va.)
148. Wales B Corp. (Va.)
149. Ashburn A Corp. (Va.)
150. Burke A Corp. (Va.)
151. 7514 A Corp. (Md.)
152. Hunt A Corp. (Md.)
153. Rive Gauche A Corp. (Md.)
154. AS Land I, Inc. (Va.)
155. American Security Capital Corporation (Del.)
156. American Security Insurance Corporation (Md.)
157. ASB Capital Management, Inc. (Del.)
158. Virginia Federal Savings Bank (U.S.)
159. Southern Service Corporation (Va.)
160. Southern Insurance Agency, Incorporated (Va.)
161. First Service Corporation of Virginia (Va.)
162. Lightfoot V Corp. (Va.)
163. Windsor V Corp. (Va.)
164. Canter V Corp. (N.C.)
165. Southern Hotel Service, Inc. (Va.)
166. Southern Finance Corporation (Va.)
167. Equitable Bancorporation Overseas Finance N.V. (Netherlands Antilles)
168. Fayette Insurance Corporation (Md.)

**PARTNERSHIPS LIST**

1. SOP M. Limited Partnership
   General Partner: SOP M. Corp.

Limited Partner: MNB

2. Baltic M. Limited Partnership
   General Partner: Baltic M Corp.
   Limited Partner: MNB

3. Westfields M Limited Partnership
   General Partner: Westfields M Corp.
   Limited Partner: MNB

4. Englewood M Limited Partnership
   General Partner: Englewood M Corp.
   Limited Partner: MNB/VFSB

5. ASB-Stevensville Limited Partnership
   General Partner: ASB Stevensville Corp.
   Limited Partner: ASB

6. Sunrise Hill Limited Partnership
   General Partner: Sunset Hill Corporation
   Limited Partner: ASB

7. Parkway A Limited Partnership
   General Partner: Parkway A Corp.
   Limited Partner: ASB

8. West Fifty Limited Partnership
   General Partner: Fifty West Corp.
   Limited Partner: MNB/VFSB

9. Cambridge VM Limited Partnership
   General Partner: Cambridge VM Corp.
   Limited Partner: MNB/VFSB

10. Vernon M Limited Partnership
    General Partner: Vernon M Corp.
    Limited Partner: MNB

11. Hallmark-Renaissance M Limited Partnership
    General Partner: Hallmark-Renaissance M Corp.
    Limited Partner: MNB

12. ASB 1660 International Limited Partnership

General Partner: ASB 1660 International I, Inc.
Limited Partner: ASB

13. Lightfoot V Limited Partnership
General Partner: Lightfoot V Corp.
Limited Partner: VFSB

14. Beaumeade M Limited Partnership
General Partner: Beaumeade M Corp.
Limited Partner: MNB

15. Carrolltowne Center Associates Limited Partnership
General Partner: SCRC Carrolltowne, Inc.
Limited Partner: MNB

16. Festival VM Limited Partnership
General Partner: Festival VM Corp.
Limited Partner: VFSB/MNB

17. 303 International M Limited Partnership
General Partner: 303 International M Corp.
Limited Partner: MNB

18. Three Ponds M Limited Partnership
General Partner: Three Ponds M Corp.
Limited Partner: MNB

19. Sweitzer M Limited Partnership
General Partner: Sweitzer M Corp.
Limited Partner: MNB

20. Sorrento M Limited Partnership
General Partner: Sorrento M Corp.
Limited Partner: MNB

21. Stevens Pier A Limited Partnership
General Partner: Stevens Pier A Corp.
Limited Partner: ASB

22. Coleman M Limited Partnership
General Partner: Coleman M Corp.
Limited Partner: MNB

23. Main Street M Limited Partnership
General Partner: Main Street M Corp.
Limited Partner: MNB

24. Melwood M Limited Partnership
General Partner: Melwood M Corp.
Limited Partner: MNB

25. Rannoch M Limited Partnership
General Partner: Rannoch M Corp.
Limited Partner: MNB

26. Glen M Limited Partnership
General Partner: Glen M Corp.
Limited Partner: MNB

27. Windemere M Limited Partnership
General Partner: Windemere M Corp.
Limited Partner: MNB

28. Campus Hills M Limited Partnership
General Partner: Campus Hills M Corp.
Limited Partner: MNB

29. Sykesville M Limited Partnership
General Partner: Sykesville M Corp.
Limited Partner: MNB

30. Madison Park A Limited Partnership
General Partner: Madison Park A Corp.
Limited Partner: ASB

31. West Madison A Limited Partnership
General Partner: West Madison A Corp.
Limited Partner: ASB

32. Baltin Yachting M Limited Partnership
General Partner: Baltin Yachting M Corp.
Limited Partner: MNB

33. Dulaney Valley Associates Limited Partnership
General Partner: Dulaney Valley Corporation
Limited Partner: MNB, Bank of Baltimore,
Banque Paribas

34. Dulaney Valley Partnership
    General Partner: Dulaney Valley Corporation
    Dulaney Valley Associates
    Limited Partnership
    Limited Partner: No ltd partners

35. Rabbit Road M Limited Partnership
    General Partner: Rabbit Road M Corp.
    Limited Partner: MNB

36. Chesapeake M Limited Partnership
    General Partner: Chesapeake M Corp.
    Limited Partner: MNB

37. Courtcom M Limited Partnership
    General Partner: Courtcom M Corp.
    Limited Partner: MNB

38. Brightseat Associates Limited Partnership
    General Partner: Bright Seat M Corp.
    Limited Partner: MNB

39. Brooke Center A Limited Partnership
    General Partner: Brooke Center A Corp.
    Limited Partner: ASB

40. Wil-Rand M Limited Partnership
    General Partner: Wil-Rand M Corp.
    Limited Partner: MNB

41. Storage A Limited Partnership
    General Partner: Storage A Corp.
    Limited Partner: ASB

42. Palisades A Limited Partnership
    General Partner: Palisades A Corp.
    Limited Partner: ASB

43. Windsor Limited Partnership
    General Partner: Windsor V Corp.
    Limited Partner: VFSB

44. Metropo M Limited Partnership
    General Partner: Metropo M Corp.

Limited Partner: MNB

45. Chalmers M Limited Partnership
General Partner: Chalmers M Corp.
Limited Partner: MNB

46. Shockey M Limited Partnership
General Partner: Shockey M Corp.
Limited Partner: MNB

47. Carrolltowne M Limited Partnership
General Partner: Carrolltowne M Corp.
Limited Partner: MNB

48. Woods M Limited Partnership
General Partner: Woods M Corp.
Limited Partner: MNB

49. Fallstone A Limited Partnership
General Partner: Fallstone A Corp.
Limited Partner: ASB

50. Nor Dan M Limited Partnership
General Partner: Nor Dan M Corp.
Limited Partner: MNB

51. Hyde Park Limited Partnership
General Partner: Ballston Corporation
Limited Partner: Carlin M. Springs Corp.

52. Germantown-Seneca Joint Venture (General Partnership)
General Partner: Harper Farm M Corp.
Ritchie Court M Corporation
Limited Partner:

53. 7514 A Limited Partnership
General Partner: 7514 A Corp.
Limited Partner: ASB

54. CC Plaza M Limited Partnership
General Partner: CC Plaza M Corp.
Limited Partner: MNB

55. Flower Hill M Limited Partnership
Flower Hill Limited Partnership
General Partner: Flower Hill M Corp.
Limited Partner: MNB

56. Accoquan M Limited Partnership
General Partner: Occoquan M Corp.
Limited Partner: MNB

57. Hampton Hunt A Limited Partnership
General Partner: Hunt A Corp.
Limited Partner: ASB

58. HICO Park M Limited Partnership
General Partner: HICO Park M Corp.
Limited Partner: MNB

59. Harper Farm M Limited Partnership
General Partner: Harper Farm M Corp.
Limited Partner: MNB

60. Rive Gauche A Limited Partnership
General Partner: Rive Gauche A Corp.
Limited Partner: ASB

61. Atlantic Sun M Limited Partnership
General Partner: Atlantic Sun M Corp.
Limited Partner: MNB

62. Quality A Limited Partnership
General Partner: Quality A Corp.
Limited Partner: ASB

63. Field A Limited Partnership
General Partner: Field A Corp.
Limited Partner: ASB

64. AS Land Limited Partnership
General Partner: AS Land II, Inc.
Limited Partner: ASB

65. Heritage Park Associates Limited Partnership
General Partner: Vernon M Limited
Partnership

Limited Partner: being clarified

66. 21 Crossroads Drive Limited Partnership
General Partner: SOP M Corp.
Limited Partner: MNB

67. Ritchie Court Limited Partnership
General Partner: Ritchie Court M Corporation
Limited Partner: MNB

68. Logan Circle A Limited Partnership
General Partner: Logan Circle A Corp.
Limited Partner: ASB

69. Brightwood M Limited Partnership
General Partner: Baltic M Corp.
Limited Partner: MNB

**Other Partnerships**

70. 206 East Redwood Street Partnership
General Partner: Marco Properties, Inc.
UTC Properties No. 2, Inc.

71. EBC Associates (a Georgia Limited Partnership)
General Partner: Chesapeake M Corp.
Limited Partner: Maryland National Financial Corporation

Supreme Court, U.S.
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No. 93-236

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN SECURITY BANK, N.A., *et al.*,
*Petitioners,*

versus

DEMPSEY SUPPLY CORPORATION,
*Respondent.*

**On Petition For A Writ of Certiorari To The Supreme Court Of Virginia**

**SUPPLEMENTAL BRIEF**

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September 15, 1993

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IN THE

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**No. 93-236**

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versus

DEMPSEY SUPPLY CORPORATION,
*Respondent.*

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**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

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## SUPPLEMENTAL BRIEF

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COME NOW the Petitioners, American Security Bank, N.A., Junius S. Morgan, Trustee, and Fred J. Rice, III, Trustee, by Counsel, and file this their Supplemental Brief calling attention to a new case not available at the time of the filing of the Petition for a Writ of Certiorari.

## ARGUMENT

### A FEDERAL COURT SITTING IN VIRGINIA RECENTLY UPHELD AN ATTACHMENT STATUTE FOR THE REASON THAT THE SAME PROVIDED FOR A BOND, JUDICIAL SUPERVISION AND A SHOWING OF EXIGENT CIRCUMSTANCES.

On July 29, 1993, a Federal court sitting in Virginia rendered a decision which conflicts with the holding of the Virginia Supreme Court in this case that a statute providing for an *ex parte* seizure without requiring a bond, exigent circumstances or judicial supervision of the issuance of the writ of attachment is constitutional.

In *Keystone Builders, Inc. v. Floor Fashions of Virginia, Inc.*, 1993 WL 311451 (W.D.Va. 1993), the United States District Court for the Western District of Virginia upheld the validity of Virginia's attachment statute against constitutional challenge. The decision is not yet reported, and is reprinted in the Appendix to this Supplemental Brief. The court undertook the three-part analysis of attachment procedures set forth by the Supreme Court in *Connecticut v. Doehr*, 111 S.Ct. 2105 (1991), and considered (1) the private interest affected by the prejudgment measure, (2) the risk of erroneous deprivation of property caused by the procedures under attack, and (3) the interest of the party seeking the prejudgment remedy, including the government's interest in providing the procedure or foregoing the added burden of greater protection.

The *Keystone* court held that the prejudgment attachment of substantial assets is certainly of serious concern to any defendant. However, the court held

that the risk of erroneous deprivation is greatly reduced by the following procedures in the Virginia statute: (1) the party seeking attachment must post a bond, conditioned upon payment of all costs and damages sustained as a result of a wrongful seizure, (2) a judge must review the application for attachment and issue an attachment only where there is reasonable cause to believe that the grounds for attachment exist, (3) notice must be provided to the defendant, and (4) the defendant is entitled to a hearing to quash the attachment within ten (10) days of his request for the same. Finally, the court noted that Virginia allows a prejudgment attachment to issue only when exigent circumstances threaten the post-judgment availability of property, and when the party seeking the attachment has a substantial interest in preserving the property which would satisfy his judgment.

The *Keystone* court held that since the Virginia statute contains the very elements that were found lacking in the Connecticut scheme struck down in *Doehr* - the posting of a bond by the creditor and the showing of exigent circumstances - the Virginia attachment statute is constitutional. The court expressly *declined* to address the constitutionality of the provision of the Virginia statute that dispenses with the showing of exigency in the case of defendants which are foreign corporations or non-residents of Virginia.

The prejudgment writ of attachment is a creditor's remedy identical to the mechanic's lien in its effect on the owner's ability to convey marketable title. Both remedies create an interest in property with priority over subsequent purchases and mortgages, thus reducing the sale or mortgage value of the subject property. The *Doehr* Court held that even the temporary

and partial impairment of property rights occasioned by attachments and liens constituted a taking of a significant property interest. It has been contended that the pre-judgment attachment of real estate somehow prevents transfer or encumbrance of the land, and is therefore distinguishable from a mechanic's lien. However, attachment "does not destroy title or the right to sell. Until a sale on execution, the debtor has full power to sell or dispose of the property attached without disturbing the . . . rights acquired by the attachment." *McInnes v. McKay,* 127 Me. 110, 141 A. 699, 702 (1928), *aff'd per curiam,* 279 U.S. 820 (1929).

The Virginia mechanic's lien statute stands in marked contrast to the Virginia attachment statute upheld in *Keystone Builders.* Essential elements, such as the posting of a bond, judicial supervision and a showing of exigent circumstances, are lacking in the Virginia mechanic's lien statute. The differences between the procedural protections in the attachment statute and the mechanic's lien statute make clear that the holding of the United States District Court for the Western District of Virginia is in conflict with the decision of the Virginia Supreme Court under attack herein.

## CONCLUSION

The conflict between the decisions in *Keystone* and the Virginia Supreme Court in this case show that the lower courts do not know if a bond, judicial supervision and exigent circumstances are constitutionally required in an attachment statute. For those reasons, the undersigned Petitioners renew their re-

quest that this Honorable Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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September 15, 1993

# APPENDIX

## APPENDIX

**United States District Court,**
**W.D. Virginia.**
**July 29, 1993.**

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**No. CIV A 93-0001-C.**

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KEYSTONE BUILDERS, INC.,
Plaintiff,

v.

FLOOR FASHIONS OF VIRGINIA, INC., et al.,
Defendants.

### MEMORANDUM OPINION

MICHAEL

By standing order of June 30, 1992, this case was referred to the Honorable B. Waugh Crigler, United States Magistrate Judge, for proposed findings of fact and a recommended disposition. The matter came before the Magistrate Judge upon defendant's Motion to Dismiss. In his Report and Recommendation, filed on June 16, 1993, the Magistrate Judge recommended that Count I of plaintiff's complaint be dismissed with prejudice and that all other claims be dismissed without prejudice to refile them in the appropriate state forum. On June 29, 1993, plaintiff filed objections to the Report and Recommendation. Said objections are deemed to have been lodged with this court in an appropriate manner and this court will undertake a *de novo* determination. *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir.1982).

The court will begin by analyzing the third and fourth objections together. Plaintiff objects to the Magistrate Judge's conclusion that a private party's misuse of state

attachment procedures cannot support a claim under 42 U.S.C. § 1983 and that therefore, plaintiffs' first Claim can stand only as a facial challenge to the constitutionality of Virginia's attachment statute, codified at Va.Code Ann. §§ 8.01-533 to 8.01-576 (Michie 1950) (amended 1993).

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1981), the Supreme Court stated that when private parties invoke state attachment procedures without grounds to do so, by definition they are not complying with state law and are therefore not acting under color of state law as required for a § 1983 claim. The Magistrate Judge correctly noted that the Fourth Circuit, following Lugar, has held that an unlawful invocation of statutory procedures does not constitute action under color of state law as required for a § 1983 claim. *Jones v. Poindexter*, 903 F.2d 1006, 1011 (4th Cir. 1990). Thus, plaintiff has no cause of action under § 1983 for defendant's alleged illegal use of Virginia attachment procedure.

To the extent plaintiff claims that defendant violated its constitutional rights by invoking Virginia's attachment procedures, plaintiff must be understood to challenge the facial validity of Va. Code § 8.01-533 *et seq.*[1] There is no allegation that any state official abused his authority by applying properly invoked attachment procedures in a manner contrary to state law; plaintiff's quarrel therefore is with the statute as written, not as applied. This court adopts the Magistrate Judge's conclusion that plaintiff does not have a cause of action under § 1983 for defendant's alleged misuse of Virginia attachment procedures, but that

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[1] The court notes here that *Lugar* held, in the pre-judgment attachment context, that a private party's lawful invocation of procedures which later come under constitutional challenge does constitute state action for the purposes of that challenge. 457 U.S. at 942. The Fourth Circuit has held, in the post-judgment attachment context, that a private party's mere invocation of challenged procedures, without more, does not transform that party into a state actor. *Jones v. Poindexter*, 903 F.2d at 1011.

plaintiff's Claim I can stand only as a constitutional challenge to the facial validity of Virginia's attachment procedures.

Plaintiff's first, second and sixth objections focus the court's attention on this question of the constitutionality of Virginia's attachment procedures. The court will undertake the three-part analysis of attachment procedures set forth by the Supreme Court in *Connecticut et al. v. Doehr*, ___ U.S. ___, 115 L.Ed.2d. 1, 18 (1991). The *Doehr* test considers (1) the private interest affected by the prejudgment measure, (2) the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternate safeguards, and (3) the interest of the party seeking the prejudgment remedy, with regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of greater protection. *Id.*

Regarding the first inquiry, the prejudgment attachment of substantial assets ($75,177.78 in this case) is certainly of serious concern to any defendant facing litigation. Virginia's requirement that the party seeking the attachment must post bond, however, greatly reduces any risk of erroneous deprivation, which is the concern of the second *Doehr* factor. Virginia requires an approved surety or cash bond of equal value to the property sought to be levied, or a bond of double the value of property sought to be seized. Va. Code § 8.01-537.1 (Michie 1950) (amended 1993). The bond must contain a condition requiring payment of all costs and damages sustained by any person as a result of a wrongful levy or seizure. *Id.* Especially where the property attached is liquid funds (as in the present case), as opposed to real property, the posting of bond assures that any property erroneously taken will be returned. The bond also assures that the party who erroneously sought the attachment has provided funds to compensate for damages resulting from the erroneous deprivation. This substantial risk to the party seeking attachment provides a

serious deterrent to bad faith attachment claims. There is still the risk that the temporary deprivation of funds may lead to a harm, such as bankruptcy, for which damages cannot completely compensate; this risk, however, is minimal.

In addition, Virginia directs judges and magistrates to review the application for attachment and issue an attachment only where there is reasonable cause to believe that the grounds for attachment exist. Va. Code § 8.01-540. Virginia also requires the plaintiff seeking attachment to swear out a petition specifying the grounds for attachment and the claim against the defendant. Va. Code § 8.01-537. Every Sheriff or Officer who attaches personal property is directed to issue a summons to the defendant, along with a form to request a hearing on exemption. Va. Code § 8.01-543. Defendants having been given notice, they are entitled to request a hearing to quash the attachment on its merits and shall have such a hearing within ten days of their motion. Va. Code § 8.01-568. Thus, Virginia has extensive precautions against erroneous deprivation of private property under prejudgment attachment. Further precautions designed to make erroneous deprivation even less likely would pose a much greater burden and expense to Virginia.

Finally, as to the third *Doehr* factor, this court will inquire into the interest of the party seeking the attachment and Virginia's ancillary interest in providing prejudgment attachment procedures. Virginia allows a prejudgment attachment to issue only when exigent circumstances threaten the post-judgment availability of property necessary to satisfy a judgment in the plaintiff's favor. Va. Code § 8.01-534. In such circumstances, the party seeking the attachment has a great interest in preserving the funds which would satisfy that favorable judgment. Virginia has a significant ancillary interest in not allowing an unscrupulous defendant to defraud a prevailing plaintiff by threatening the availability of funds to satisfy the judg-

ment. While Virginia has a similar interest in preserving the property rights of a defendant who has not yet and may never be found liable to the plaintiff, the risk to the defendant's property is minimal because of the bond requirement. The risk if further minimized by Virginia's provision of a post-attachment hearing in which the defendant can quash the attachment upon a showing that the plaintiff is not likely to succeed on the merits of her claim. Va. Code § 8.01-568. Thus both the party seeking the attachment and the Commonwealth have significant interests in a properly obtained attachment.

Before it concludes its analysis under *Doehr*, the court must note, as did the Magistrate Judge, that the Virginia attachment statute contains the very elements—the showing of exigent circumstances chief among them—that were found lacking in the Connecticut scheme that the *Doehr* court struck down. In fact, the Court approvingly cited the Virginia scheme, along with those of 27 other states and the District of Columbia, as requiring a showing of extraordinary need, posting of bond, and a prompt post attachment hearing. 115 L.Ed.2d at 17, 22-23.

Nevertheless, plaintiff points to one provision in the Virginia statute (not applicable in this case but considered here because of the facial nature of the challenge) that may not require the showing of exigency so important to the *Doehr* Court. Plaintiff argues that being a foreign corporation or not being a resident of Virginia, in and of itself, is not an exigent circumstance, but is nonetheless grounds for attachment under Va. Code § 8.01-534, P 1. Plaintiff cites no authority addressing the constitutionality of this provision, and this court will not address that question now. Were this court to find the provision unconstitutional, however, only paragraph 1 of Va. Code § 8.01-534 would be invalidated. This provision stands independent of the remaining provisions and severing it would in no way thwart the overall intent of the Virginia legislature in enacting the legislation. All other grounds upon which an

attachment could issue in Virginia clearly call for exigent circumstances.[2]

Having applied the test set forth in *Doehr*, and finding plaintiff's challenge to the statute unpersuasive, this court adopts the Magistrate Judge's conclusion that the Virginia attachment procedures are facially constitutional. Though defendants in general (and plaintiffs in this case) have a great interest in the property attached, the interest of plaintiffs in safeguarding the funds available for a judgment in their favor warrants the minimal risk of erroneous deprivation of property posed by the Virginia attachment procedures. Plaintiff's first, second, and sixth objections are therefore overruled.

Plaintiff's seventh objection states generally that infirmities and ambiguities in the statute enabled defendants to abuse the procedure to the detriment of plaintiff. The court notes, however, that its analysis under *Doehr* commands the conclusion that the Virginia attachment statute is as firm and unambiguous as it is constitutionally required to be, given the extensive protection it offers against the prospect of erroneous deprivation. Plaintiff's objection is therefore without merit, and its claim that Virginia's attachment statute is unconstitutional still must fail.

Finally, in its fifth objection plaintiff contests the Magistrate Judge's recommendation that this court dismiss plaintiff's remaining state law claims. When supplemental jurisdiction is founded solely upon a federal question and the federal claim is dismissed, this court is free to dismiss the remaining state claims without prejudice to renew them in state court. See 28 U.S.C. § 1367(c)(3). The Magistrate Judge correctly recommended that plaintiff's remaining

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[2] The court notes in passing that were it to sever paragraph one, nonresidents and foreign corporations might nevertheless face attachment on a showing of exigent circumstances under any of the remaining provisions. Severance therefore would not create an exemption for such parties in frustration of the statute's purpose.

state law claims be dismissed. For the foregoing reasons, the Magistrate Judge's Report and Recommendation shall be adopted as modified and plaintiff's Claim I shall be dismissed with prejudice. Plaintiff's remaining state claims shall be dismissed without prejudice to refile them in state court.

An appropriate order shall this day issue.